

OFFICE OF THE GENERAL COUNSEL  
Division of Operations-Management

MEMORANDUM OM 99-35

July 14, 1999

TO: All Regional Directors, Officers-in-Charge,  
and Resident Officers

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Conditional Party Position Statements  
Revocation of OM 99-13

A practice that is becoming more prevalent among charged parties is to provide position statements with the express condition that all information provided therein is to remain confidential and/or cannot be used in the event of litigation. This can become a litigation issue, if the Region determines that the position statement should be introduced at trial. The Board has consistently found that position statements prepared by attorneys in the management of litigation are admissible against the client. See Federal Rules of Evidence 801(d)(2)(C).

As many law firms and consultants practice in more than one Region, it is appropriate that the Agency's policy regarding the use of these statements be consistent from Region to Region. Parties should be told that the Agency cannot be bound by any limitation that the parties would put on the use of evidence of position statements. This can be accomplished by incorporating this message into the Regions' docketing correspondence.

The Regions' docketing letters should specifically inform the charged parties that the evidence and statements of position submitted by the parties will be used by the Agency without qualification or condition. Furthermore, the charged parties should be informed that if such a condition is incorporated into its position statement, the condition will be disregarded and the position statement will be considered in the investigation and may be introduced into the record in the event the matter is litigated. I have attached a sample docketing letter with suggested language on this subject **bolded**. These instructions supersede the instructions set forth in OM 99-13 which after further analysis is revoked.

If you have any questions about this policy, please contact your AGC or Deputy or me.

R. A. S.

Attachment

cc: NLRBU

MEMORANDUM OM 99-35

This is to inform you that a charge, a true copy of which is enclosed, was filed in the above-entitled matter. Also enclosed is a statement (Form NLRB-4541) briefly setting forth our investigation and voluntary adjustment procedures.

I would appreciate receiving from you by , a full and complete written account of the facts and a statement of your position with respect to the allegations of the charge. Also, please complete and return one copy of the enclosed questionnaire regarding commerce information (Form NLRB-5081).

The case has been assigned to the above-listed Board agent. When the Board agent solicits relevant evidence from you or your counsel, I request and strongly urge you or your counsel to promptly present to the Board agent any and all evidence relevant to the investigation. It is my view that a refusal to fully cooperate during the investigation might cause a case to be litigated unnecessarily. Full and complete cooperation includes, where relevant, timely providing all material witnesses under your control to a Board agent so that witnesses' statements can be reduced to affidavit form, and providing all relevant documentary evidence requested by the Board agent. The submission of a position letter or memorandum, or the submission of affidavits not taken by a Board agent, does not constitute full and complete cooperation. **Further, please be advised that we cannot accept any limitations on the use of any evidence or position statements that are provided to the Agency. Thus any claim of confidentiality cannot be honored except as provided by Exemption 4 of FOIA, 5 U.S.C. Sec. 552(b)(4), and any material submitted may be subject to introduction as evidence at any hearing that may be held before an administrative law judge. In this regard, we are required by the Federal Records Act to keep copies of documents used in furtherance of our investigation for some period of years after a case closes. Further, we may be required by the Freedom of Information Act to disclose such records upon request, absent some applicable exemption such as those that protect confidential financial information or personal privacy interests (e.g., Exemption 4 of FOIA, 5 U.S.C. Sec. 552(b)(4)). Accordingly, we will not honor any request to place limitations on our use of position statements or evidence beyond those prescribed by the foregoing laws, regulations and policies. Please state the case name and number on all correspondence.**

Attention is called to your right, and the right of any party, to be represented by counsel or other representative in any proceeding before the National Labor Relations Board and the courts. In the event that you choose to have a representative appear on your behalf, please have your representative complete Form NLRB-4701, "Notice of Appearance," and forward it promptly to this office. If you choose to have your agent

receive exclusive service of certain documents and communications, you may utilize enclosed Form NLRB-4813 as described in the enclosed statement of procedures.

Please be advised that, under the Freedom of Information Act, unfair labor practice charges and representation petitions are subject to prompt disclosure to members of the public upon request. In this regard, you may have received a solicitation by organizations or persons who have obtained public information concerning this matter and who seek to represent you before our Agency. You may be assured that no organization or person seeking your business has any "inside knowledge" or favored relationship with the National Labor Relations Board; their information regarding this matter is only that which must be made available to any member of the public.

Customer service standards concerning the processing of unfair labor practice cases have been published by the Agency and are available upon request from the Regional Office. Your cooperation in this matter is invited so that all facts of the case may be considered.

Enclosures

CERTIFIED MAIL (RETURN RECEIPT REQUESTED)